IN THE UNITED STATES DISTRICT COURT

DISTRICT OF COLORADO

Judge Qwerty

Civil Action No. 2:23-CV-0020/QWT

State of COLORADO,

Plaintiff,

v.

The UNITED STATES OF AMERICA

Defendant,

ORDER AND OPINION CONTAINING FINDINGS OF FACT AND CONCLUSIONS OF LAW

MAXONYMOUS, Assistant State Attorney, and TOXICOUST, Colorado Attorney General, appeared for the plaintiff-movant.

JONOFDOOM, United States Attorney General and SAMSCHULPEN2, United States Assistant Attorney General appeared for the defendant-nonmovant.

I – Background

In a functioning, democratic, country, which respects the rights, and pursues the bettement, of its citizens, and venerates its laws, various entities of government must work in concert in order to serve the people from whom they derive their means of functioning, and from whose collective, abstract, sovereign they find their powers. At times, however, these authorities inevitably differ in their interests and

policies. The action at this court's bar is one particularly eloquent illustration thereof.

Before the Court today is the venerable suit brought by the State of Colorado against the United States of America, alleging that the "Dresden Road Ownership Act" (DROA), Pub. L. No. 1-3 (2023)[1], is an unconstitutional statute in violation, *inter alia*, of Amendment X to the United States Constitution. In relevant part, the Act in question provides that:

> (a) The United States Department of Defense shall, upon the passage of this act, take immediate ownership of the stretch of Dresden Road from the easternmost checkpoint to the westernmost checkpoint of the Colorado National Guard Base.
>
> (b) The United States Department of Defense shall, if it so chooses, exercise the authority to close Dresden Road and enforce 18 U.S. Code § 1382 to any civilian traffic not associated with the United States Federal Government.

Id. at § 4.

The State brought suit around the 15th August 2023 and the United States waived process. After surviving a motion to dismiss, the State filed a motion for summary judgment on the 29th September 2023. The essence of the State's argument turns on the fact that the Dresden Road does not "involve interstate commerce" U.S. Const. Art. 1, § 8, cl. 3, and so falls beyond the Federal government's powers in accordance with the 10th Amendment, violating the State's rights. The United States advances in defence that the DROA is nevertheless constitutional as it was passed under another one of Congress'

[1] https://trello.com/c/AuCVNRjZ/41-public-law-1-3-dresden-road-ownership-act

enumerated powers, the "necessary and proper" or "sweeping" clause, Art. 1, § 8, cl. 18. The United States so alleges by reason of "security concerns" for the Colorado National Guard ("CONG") base located on the Dresden Road ("Dresden Road Base"), and furthermore assets that Article IV of the United States Constitution stands for the proposition that "public lands may be appropriated by the authority of Congress", we assume, under § 3, cl. 2 thereof.

II – The Facts

We orally – albeit informally – denied summary judgment on the 10th October 2023 at 09:11 UTC because we found the pleading of facts lacking such that we could determine only with great difficulty what facts were even in dispute. The matter subsequently went to a short and informal trial held at Dentsville.

First of all, although no party pleads or otherwise has placed before the court sufficient information on this particular point, we take judicial notice of the geographic location of the Dresden Road – it is undoubtedly of an indisputable character unless, of course, either party purports to be gifted with a building-moving wand – which they do not. In ascertaining this geographic location, we have had reference to a reliable map[2] of which a screenshot is appended to this judgment which we take judicial notice of – we pause briefly to note that on top of "government maps [which are] are generally an acceptable source for taking judicial notice" *U.S. v. Burch*, 169 F.3d 666, 672 (10th Cir. 1999), see also *U.S. v. Bello*, 194 F.3d 18, 23 (1st Cir. 1999) ("official government maps have long been held proper subjects of judicial notice"), we can also take judicial notice of reliable private maps. See

[2] https://nusaroblox.com/public-map (We disregard as merely the map creator's private interpretation of the law, however, the "jurisdictions" overlay of the map and employ it merely for geographic disposition)

Pahls v. Thomas, 718 F.3d 1210, 1217 n.1 (10th Cir. 2013) (Taking judicial notice of information provided by Google Maps), *United States v. Orozco-Rivas*, No. 19-6074, at *19 n.7 (10th Cir. Apr. 21, 2020) ("Most courts are willing to take judicial notice of geographical facts and distances from private commercial websites such as MapQuest, Google Maps, and Google Earth.") (quoting *The Google Knows Many Things: Judicial Notice in the Internet Era*, 39 Colo. Law. 19, 24 (2010)).

It is common ground that the Dresden Road military base hosts the Colorado National Guard, although the parties disagree as to whether or not other elements of the United States Military are stationed there too. At trial the plaintiff's counsel alleged that all military personnel on site were Colorado National Guard personnel, something which the defence appears to disagree with. We note additionally that the State also raises in support of its position the passing of state legislation, the Colorado National Guard Act ("CONGA"), which reads in operative part:

> All National Guard installations and all land surrounding them, excluding the stretch of Dresden Road between the two checkpoints in the MEZ[3], in Boulder County shall be considered property of the Great State of Colorado.

III – Discussion

We think for reasons expounded below that the parties' arguments overlook the core legal issues underlying this action, and propose in lieu a four-step enquiry – we attempt to ascertain who owned the base

[3] We assume "MEZ" to be an acronym for "Military Exclusion Zone". See for instance a more recent bill on the same matter, the Colorado National Guard Organization Bill, Colo. Bill 18.

and the neighbouring road before the passing of the DROA (A and B), how the United States and what gained control over through the DROA and the impact of the CONGA (C) and the validity of the regulations contained within the DROA over the Dresden Road (D).

A – The parties' brilliant attempt at missing the point

The plaintiff's arguments at our bar appear to revolve purely and essentially regarding the question of whether or not Congress may constitutionally make laws regarding the Dresden Road Base – the State argues that in doing so Congress infringed its sovereignty, whereas the United States advance in response that the necessary and proper clause authorises the legislation. Much was made at trial of the distinction between whether or not a CONG base with regular military units stationed was a national guard or ordinary military base, among other things – for context, "[t]he National Guard is a state/federal hybrid" *Hanson v. Wyatt*, 552 F.3d 1148, 1151 (10th Cir. 2008) and subjected to dual regulation, and is heavily regulated by the Federal Government as such[4].

[4] See *Nelson v. Geringer*, 295 F.3d 1082, 1091-92 (10th Cir. 2002) *accord U.S. v. Hutchings*, 127 F.3d 1255, 1258 (10th Cir. 1997) ("The National Guard occupies a unique place in our federal system of government; it has been described appropriately as a "hybrid" body."). Most circuits have explained the legal status of the National Guard in a similar way, *cf. Fed. Labor Relations Auth. v. Mich. Army Nat'l Guard*, 878 F.3d 171, 177 (6th Cir. 2017) ("While each state unit of the National Guard is a state agency, under state authority and control, the activity, makeup, and function of the Guard is provided for, to a large extent, by federal law.") (quoting *N.J. Air Nat'l Guard v. FLRA*, 677 F.2d 276, 279 (3d Cir. 1982)) (internal quotation marks omitted), see also *Best v. Adjutant General, Florida*, 400 F.3d 889, 891 (11th Cir. 2005), *Singleton v. M.S.P.B*, 244 F.3d 1331, 1333 (Fed. Cir. 2001) ("Within each state, the national guard is a state agency, under state authority and control. At the same time, the activity, make-up, and function of the national guard are provided for, to a large extent, by federal law."), *Charles v. Rice*, 28 F.3d 1312, 1315 (1st Cir. 1994) ("In each state the National Guard is a state agency, under state authority and control. At the same time, federal law accounts, to a significant extent, for the composition and function of the Guard.") (quoting *Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765, 767 (7th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 347, 126 L.Ed.2d 311 (1993)).

Deciding this distinction however is to our mind at best inapt at characterising the situation. In encouraging us to do so – by inquiring into how the United States Army trains its soldiers, or what uniforms soldiers should wear, the parties, attempting to resolve their differences over a pothole, are in reality digging themselves into a pit mine. The distinctions we must start by making are (1) what entity – the United States, Colorado, or another person or entity – owns the land and (2) assuming the Federal Government owns it, how it came into governmental possession.

To our mind there is no profound need to attempt to understand the complex workings of federalism at this juncture – instead the State CONGA and Federal DROA, and, in fact, their arguments at our bar, both encounter the same fatal flaw in attempting to discuss the regulation by the DROA/CONGA – they do not address the question of *who* the owner of the land is, and *how* the owner obtained such ownership.

Broadly speaking, there are two ways in which the Federal Government may obtain ownership of the Dresden Road, assuming that the State is indeed owner of the road (we discuss the regulation of the road and the pre-DROA ownership of the road *infra* as they are not one but three freestanding issues). Firstly, it may, with the agreement of the State, create a Federal enclave. Alternatively, it may forcibly acquire the land by way of eminent domain.

"A federal enclave is created when a state cedes jurisdiction over land within its borders to the federal government and Congress accepts that cession. These enclaves include numerous military bases, federal facilities, and even some national forests and parks." *Allison v. Boeing Laser Technical Servs.*, 689 F.3d 1234, 1235 (10th Cir. 2012). This is a

bilateral process, an essential concretisation of principles of co-operative federalism, since "[a]bsent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory" *Utah Native Plant Soc'y v. U.S. Forest Serv.*, 923 F.3d 860, 870 (10th Cir. 2019) (quoting *Kleppe v. New Mexico*, 426 U.S. 529, 543-44, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976)). Assuming that no specific reservation of power – such as by reserving the power to collect taxes, or enforce the criminal law, *cf. U.S. v. Fields*, 516 F.3d 923 (10th Cir. 2008) (Oklahoma cession of concurrent jurisdiction) – will have been made however, "when an area in a State becomes a federal enclave, "only the [state] law in effect at the time of the transfer of jurisdiction continues in force" as surrogate federal law." *Parker Drilling Management Services, Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) (quoting in part *McQuiggin v. Perkins*, 569 U. S. 383, 398, n. 3, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013)). Given the fact that it is that very State which brings the action today, and that no enactment has been passed by it granting Federal jurisdiction, we think it safe to assume that the Dresden Road is not a federal enclave.

Eminent domain, meanwhile, is a different proposition altogether. "Eminent domain is the power of the government to take property for public use without the consent of the owner." *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2251 (2021). This power was already described over half a century ago as "well established" *Paul v. United States*, 371 U.S. 245, 264 (1963). There are, however, two caveats to this power. Firstly "the United States does not obtain the benefits of Art. I, § 8, cl. 17" *Paul v. United States*, 371 U.S. 245, 264 (1963) and the legal powers it so enjoys are *akin* to "that of an ordinary proprietor" *Id*. We emphasise however the word "akin," as several circuits have been at pains to point out that the language of the Paul

Court, namely "simply", is an understatement of the government's powers. *Cf. United States v. Davis*, 726 F.3d 357, 364 n.3 (2d Cir. 2013) ("To be sure, the federal government's possession of land is never really that of an ordinary proprietor") (internal quotation marks omitted), *U.S. v. Gabrion*, 517 F.3d 839, 847 (6th Cir. 2008) (Holding that "the broad proposition that the federal government's rights in federally owned property are *never* merely those of an ordinary proprietor" is supported by authority). This distinction becomes useful at a later juncture of our enquiry. Secondly, the party subjected to eminent domain has the right to be paid, since "[u]nder the Fifth Amendment, private property may not be taken for public use without just compensation." *N. Natural Gas Co. v. L.D. Drilling*, 862 F.3d 1221, 1232 (10th Cir. 2017).

There are, however, two means by which the government (in this case the United States) may obtain title by eminent domain. "Broadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: it can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings. Under the first method — physical seizure — no condemnation proceedings are instituted, and the property owner is provided a remedy under the Tucker Act . . . to recover just compensation." *Benderson Dev. Co. v. U.S. Postal Service*, 998 F.2d 959, 962 (Fed. Cir. 1993) (quoting *United States v. Dow*, 357 U.S. 17, 21, 78 S.Ct. 1039, 1044, 2 L.Ed.2d 1109 (1958)). We discuss the implications of each *infra*.

B – The prior ownership of the Dresden Road and its Base

We now consider an underlying yet essential question which conditions our response to the legal difficulties raised in part A – namely, we must understand who, before the DROA's enactment was actually the owner of the land. If this owner is the Federal Government, for instance, then unsurprisingly, no "taking" would have occurred for the purposes of eminent domain.

It bears noting as a question of liminary disposition that whilst, once we have trimmed this elaborate case founded upon grandiloquent principles of federalism of such feathers as are quite worthy of a peacock, however, we are left with something not altogether different from a title dispute. This question must be asked both of the Dresden Road Base as well as of the Dresden Road itself. We must thus consider whether the action ought to have been brought under the Federal Quiet Title Act of 1972, 28 U.S.C. § 2409a or not. We hold that it does not, both since the Dresden Road itself has been "condemned" by Act of Congress, a curious manner of proceeding – we find this more akin to . Were the original title dispute between two private landowners, we think that the question would have been clear-cut as moot. *Cadorette v. U.S.*, 988 F.2d 215 (1st Cir. 1993). The trouble here is that one of the parties to the title dispute is precisely that which has exercised its power of eminent domain. In determining mootness, "[t]he crucial question is whether granting a present determination of the issues offered will have some effect in the real world" *Brown v. Buhman*, 822 F.3d 1151, 1165-66 (10th Cir. 2016) (quoting *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1212 (10th Cir. 2005)), yet not only would such a determination be purely academic, the added delay and expense in seeking such a proceeding would be futile, since we can

determine the question of prior ownership as part of our proceedings at bar. See *Cadorette*, 988 F.2d, *supra*.

We are faced at this present juncture with a somewhat peculiar factual situation. The land – both the base and its neighbouring road – of which we speak appears not in any land register, and has no title deeds attached to it. This is not altogether unprecedented, although it does create new complexities of law which this court must seek to address. Normally, when there are no deeds or other documents relating to title which may be interrogated for judicial purposes, courts must rely on a series of principles elaborated at common law in order to establish title. Such lost deed questions rarely arise in Federal courts. They are, however, simply a subset of cases in which certain documents have been lost or destroyed, and in the one instance in which a Colorado court addressed it in an appellate case, holding that a lost instrument's contents must be proven by "clear and conclusive" evidence *Walker v. Drogmund*, 101 Colo. 521, 525 (Colo. 1937). See also *In re Kim*, 585 B.R. 881, 885-86 (D. Colo. 2018) *aff'd on other grounds In re Kim*, 809 Fed. Appx. 527 (10th Cir. 2020), and *People v. Heckers*, 37 Colo. App. 166, 169 (Colo. App. 1975) (quoting *Walker*). Needless to say, however, neither party alleges, nor do we think, would they be able to prove, the existence of a lost deed sympathetic to their case.

We are thus left with an unusually primitive, fundamental state of the law. There is more than a little truth to the maxim that possession is nine-tenths of the law. Long ago, the Supreme Court held that "few principles of more ancient or more dignified origin [than the law of possession]. It is the law of kings, that the fact of possession proves the right of possession; and the idea is thrown out by Blackstone, that it probably passed down from greater to less, until it extended to every

man's close." *Bradstreet v. Huntington*, 30 U.S. 402, 436 (1831) *accord Campbell v. Holt*, 115 U.S. 620, 623 (1885) ("Possession has always been a means of acquiring title to property. It was the earliest mode recognized by mankind of the appropriation of anything tangible by one person to his own use, to the exclusion of others, and legislators and publicists have always acknowledged its efficacy in confirming or creating title."). These all feed into that same basic presumption that, "[g]enerally speaking, the presumption is that the person in possession is the owner in fee." *Bradshaw v. Ashley*, 180 U.S. 59, 63 (1901). The ordinary means by which this presumption is served is the mechanism of adverse possession. Colorado courts have explained that "adverse possession is very difficult to establish" *Archuleta v. Gomez*, 200 P.3d 333, 344 (Colo. 2009). Indeed, there are two specific difficulties in the case at bar.

First, adverse possession is only established when, on the basis of "clear and convincing evidence" *Gerner v. Sullivan*, 768 P.2d 701, 703 (Colo. 1989) (quoting *Raftopoulos v. Monger*, 656 P.2d 1308, 1311 (Colo. 1983)), the possessor shows that, among other things "the use [has] continu[ed] without effective interruption for the prescriptive period" *Lobato v. Taylor*, 71 P.3d 938, 954 (Colo. 2002). In Colorado, this is of eighteen years, Colo. Rev. Stat. § 38-41-101, a period which, even if reduced, *arguendo*, something we are not entirely sure of, by an eight, to a duration of 27 months by operation of the "JAG doctrine" *cf. Jsjsjbsd v. Attorney* 15 U.S. _____, 2 A.A.Dig _____ (nUSA 2023), has clearly not been attained.

Secondly, the Court is faced now and here at this bar with a dispute of an unusual character – the claim as to title belongs to one of two parallel sovereigns. It is of indisputable consistency that "[t]here [can]

be no adverse possession against the [State]" *Harrison v. Everett*, 135 Colo. 55, 61 (Colo. 1957) (quoting *Omaha Grant Co. v. Tabor*, 13 Colo. 41, 21 Pac. 925), that is to say that "no title to public lands can be obtained by adverse possession, laches, or acquiescence" *Sweeten v. U.S. Dept. of Agr. Forest Service*, 684 F.2d 679, 682 (10th Cir. 1982) (quoting *United States v. California*, 332 U.S. 19, 39-40, 67 S.Ct. 1658, 1668, 91 L.Ed. 1889 (1947)). The law of both sovereigns say just as much, and the fact that the occupier is the other sovereign does not alter our understanding change very much. *Cf. Block v. North Dakota*, 461 U.S. 273, 292 n.28 (1983) (Explaining that United States' acquisition of title is governed normally "purely by virtue of state law".). The "state law" spoken of in *Block* does not appear to allow adverse possession of State land, even if some authorities might imply that they might. *Cf. Board of Com'rs of Pitkin Cty. v. Timroth*, 87 P.3d 102, 108 (Colo. 2004) ("[O]ne cannot adversely possess against the sovereign") *accord Palmer Ranch v. Suwansawasdi*, 920 P.2d 870, 874 (Colo. App. 1996) (Explaining that "one cannot claim adverse possession to public land").

The traditional notions of adverse possession, therefore, we think, reach thus a logical boundary, for in order to hold that one or the other sovereign has acquired the land through some form of hostile possession, we must first ensure ourselves that the hostility was not against the other of the two sovereigns, giving ourselves an egg to go with the proverbial chicken. Even so, it is thus along these lines of reflection, we may think, that we may identify a workable theory of ownership in the absence of title.

The doctrine of "presumed grant", also known as "presumed lost deed" appears to us to be of some interest. Even though "[t]he doctrines

of adverse possession and presumed grant are very similar in nature" *State v. Phillips*, 400 A.2d 299, 306 (Del. Ch. 1979), presumed grant doctrines differ from the former. Both of the difficulties that the classic variant adverse possession presents are greatly alleviated under presumed grant. To begin with, presumed grant or presumed lost deed do not appear to impose a minimum prescriptive period of a strict description. Whilst some of the authorities appear to point to State-specific statutes imposing such a period (somewhere between 10 and 15 years generally), and there are authorities which appear to even suggest that possession must last longer than the statutory prescriptive period for adverse possession, *cf. Frandorson Properties v. Northwestern Mut. Life*, 744 F. Supp. 154, 158 (W.D. Mich. 1990) (Explaining that "when use has been in excess of the prescriptive period by many years, a presumption of a grant arises") (quoting *Reed v. Soltys*, 106 Mich. App. 341, 346, 308 N.W.2d 201 (1981)), the greater number of authorities do not specify a period. They speak instead in terms which leave to the court a measure of discretion as to the actual duration of occupation in absolute terms. See *Clark v. Amoco Production Co.*, 794 F.2d 967, 970 (5th Cir. 1986) ("a long asserted and open claim"); *Phillips v. State ex rel. Department of Natural Resources & Environmental Control*, 449 A.2d 250, 256 (Del. 1982) (The doctrine operate such that "the *long continued possession* of land by one claiming as owner gives rise to the presumption of a valid conveyance to him or to the person under whom he claims") (Emphasis added); *United Congregational Evangelical Churches v. Kamamalu*, 59 Haw. 334, 342 (Haw. 1978) ("substantial number of years"); *Butler v. Johnson*, 180 Ark. 156, 160 (Ark. 1929) ("a long period of time"); *Board of Ed. of Calhoun C. v. Warner*, 853 So. 2d 1159, 1167 (Miss. 2003) ("a very long time"). More pertinently here, we think that the grant, whilst

it may not satisfy the requirement, which the Virginian courts claim, rightly or wrongly, to have been imported from England of 20 years, *Chittenden v. Waterbury Center Community Church*, 168 Vt. 478, 489 (Vt. 1998), and which is not, as we have just demonstrated, uniformly applied across all jurisdictions – the shortest explicitly prescriptive period we have found is of five years, and twenty years is perhaps one of the longest – we are reasonably satisfied that possession since time immemorial will satisfy the requirements of lost grant – in fact the modern English courts have explained that the 20-year period is one after which custom since time immemorial will be presumed. *Cf. Reg v. Oxfordshire County Council and others, ex parte Sunningwell Parish Council* [2000] AC 335 ("If there was upwards of 20 years' user, [usage since time immemorial] would be presumed in the absence of evidence to show that it commenced after 1189 [the formal English measure of time immemorial]."). Indeed, some courts have expressly rejected the idea of an arbitrary figure of 20 years – and most of those other courts which impose a period do so by analogy to that jurisdiction's prescriptive period – instead emphasising the importance of the passage of time as diminishing the ability to ascertain title by sole regard to formal documentation. See *Gillies v. Orienta Beach Club*, 159 Misc. 675 (N.Y. Sup. Ct. 1935). Indeed, the *Gillies* court exhorts us to "conside[r] the adaptability of the principle to changed conditions" *Id.* at 681, and in the case at its bar refused to recognise immemorial usage giving rise to a presumption of lost grant notwithstanding *fifty* years of usage.

The second difference, we think, is more important still. As the Supreme Court has explained, "[u]nder the lost grant doctrine, lapse of time, under carefully limited circumstances, may cure the neglect or failure to secure the proper muniments of title, *even against the United*

States." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 258 n.5 (1985) (quoting *United States v. Fullard-Leo*, 331 U.S. 256, 270 (1947)) (emphasis added). That is to say, in short, that since the very concept of lost grant or presumed grant is that "long-continued use or possession can raise a presumption that the right exercised was previously conveyed to the user or possessor and that the instrument of conveyance has been lost" *Ellington v. Becraft*, 534 S.W.3d 785, 794 (Ky. 2017) (quoting Jerome J. Curtis, Jr., *Reviving the Lost Grant*, 23 Real Prop. Prob. & Tr. J. 535, 535 (1988)), the doctrine "allows assertions of claims against the sovereign, despite statutes barring adverse possession against the State" *Board of Ed. of Calhoun C. v. Warner*, 853 So. 2d 1159, 1166-67 (Miss. 2003). The difference between the two is that in adverse possession, the citizen takes from the sovereign what is that belonging to that sovereign on the basis of his failure to exercise his rights over it, whereas in presumed grant it is assumed that the State *chose* to cede that land. Mississippi does not stand alone in recognising this difference. *Cf. State v. Phillips*, 400 A.2d 299 (Del. Ch. 1979) *accord United Congregational Churches*, 59 Haw., *supra*.

We now consider the applicability of the doctrine to Colorado and Colorado law. We note briefly in passing that as a general rule, "federal courts bear a duty to decide questions of state law when necessary to render a judgment." *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1235 (10th Cir. 2012). Even though the Colorado courts have not expressly addressed the issue *Schuman v. Venard*, however, Colorado's Supreme Court did instruct that under Colorado law, "the State or general government, in its corporate and sovereign capacity, holds and always retains the absolute and ultimate right of property in and to all the land within its territorial limits; and that possession in an individual

is *prima facie* evidence of the grant of an estate from the sovereign authority" 110 Colo. 487, 492 (Colo. 1943). We note additionally that it is a general principle of Colorado law that Colorado courts will apply and construe "the extent that it is reasonable to apply the English common law to the needs and conditions of [the] state" *Rudnicki v. Bianco*, 501 P.3d 776, 785 n.2 (Colo. 2021) (quoting *Lovato v. Dist. Ct.*, 198 Colo. 419, 601 P.2d 1072, 1075 (1979)). C.R.S. § 2-4-211. As an aside we observe in passing that we do, and have the inherent power to, apply and adopt those provisions of Colorado statute as are germane to our judicial power and innate to the normal functioning of the court, with the same caveat, namely that they must be reasonable with regard to the needs and conditions of the State. When doing so we cannot disturb the fundamental character of the laws, however, nor treat the law as a bric-a-brac shop from which to build our own disparate theories. The contrary position, of course, would be that of an absurd and unreasonable jurisdictional system which as a practical matter prevents courts from discharging their jurisdiction – by depriving courts of personal jurisdiction or leaving people with rights unable to vindicate them, for example.

All the American authorities we have identified point to presumed grant being a doctrine of some antiquity in English jurisprudence, and the cases we have found from the far side of the Atlantic all appear to point that way too. See *The Lord Forret v Matters* [1678] Mor 5139; *Dalton v. Henry Angus & Co* 6 App Cas 740; *Chalmer v Bradley* 37 Eng. Rep. 294, (1819) 1 Jac & W 51; *Doe v. Hirst* 147 Eng. Rep. 537 (Ch), (1822) 11 Price 475. For a fuller history, see William B. Stoebuck, *The Fiction of Presumed Grant*, 15 Kan. L. Rev. 17 (1966). Whatever it is, it is clear to us that some doctrine of presumed grant was well understood at common law, and remains to this day, *cf. Ex parte*

Sunningwell, [2000] AC, *supra*, even if its importance has gradually diminished with the significant advances in public recordkeeping and better documentation techniques. The basis of the doctrine of presumed grant is, to our mind, largely relevant and applicable to the State of Colorado. As the Supreme Court of New Mexico explained, "[f]or many years it has received recognition in the United States as an appropriate means to quiet long possession and it is based upon concepts of both logic and policy. It is logical because the inference of a lost or neglected grant is a natural one to be drawn from the facts; it serves the policy of protecting those who have maintained long possession of property with acquiescence from the record owner." *El Paso Production Co. v. PWG Partnership*, 116 N.M. 583, 589 (N.M. 1994). The 9th Circuit, expanding on the same doctrine, reminds us that "'presumptions,' as said by Sir William Grant, 'do not always proceed on a belief that the thing presumed has actually taken place. Grants are frequently presumed … merely for the purpose, and from a principle of quieting the possession. There is as much occasion for presuming conveyances of legal estates; as otherwise titles must forever remain imperfect, and in many respects unavailable; when from length of time it has become impossible to discover in whom the legal estate (if outstanding) is actually vested." *Oregon & C.R. Co. v. Grubissich*, 206 F. 577, 588 (9th Cir. 1913) (quoting *Fletcher v. Fuller*, 120 U.S. 534, 7 S.Ct. 667, 30 L.Ed. 759 (1887)). As a matter of fact, most jurisdictions – including federal law for that matter – appear to recognise some variant of the theory, as the diverse authorities we have cited *supra* demonstrate. Some, but not all, jurisdictions apply adverse possession and lost grant separately, distinguishing generally between presumed grant for easements and adverse possession for title, *cf. Shellow v. Hagen*, 9 Wis. 2d 506, 511 (Wis. 1960); *Cumulus*

Broadcasting, Inc. v. Shim, 226 S.W.3d 366, 378-79 (Tenn. 2007). The United States Supreme Court meanwhile has suggested otherwise. *Fullard-Leo*, 331 U.S., at 270 (Lost grant "first appeared in the field of incorporeal hereditaments but has been extended to realty") (citing *Ricard v. Williams*, 20 U.S. (7 Wheat.) 59, 109). This view is shared by some jurisdictions, see authorities cited *supra*.

We now consider whether any party is entitled to claim presumed grant. The factual situation here is somewhat peculiar. Rome, as we say, was not built in a day. The Dresden Road and its military base, however, effectively were. We must apply common law in a way that suits the "needs and conditions" of Colorado. Nothing in Colorado law appears to affirmatively reject any doctrine of presumed grant, and it appears to us to be the only way by which this action, and to some extent actions like these, can be resolved – either the United States can successfully show through its mere possession a presumption of a grant, or it will be recalled that "the State … holds and always retains the absolute and ultimate right of property in and to all the land within its territorial limits" *Schuman* 110 Colo., at 492, and this Court must recognise the State's title to the land the base is on.

Generally speaking, since the very crux of the lost grant doctrine is the continuous and long-maintained possession, it is invariably that requirement which is fundamentally essential to the working of the doctrine. Some authorities point to additional features of refinement, most of which resemble the requirements for adverse possession. Cf. *Clark v. Amoco Production Co.*, 794 F.2d 967, 970 (5th Cir. 1986) (Holding under Texas law that a successful presumed lost grant claim "requires the proof of three elements: (1) a long asserted and open claim, adverse to that of the apparent owner; (2) a nonclaim by the

apparent owner; and (3) acquiescence by the apparent owner in the adverse claim.").

Here we distinguish two instances – the military base itself, whose ownership we need not excessively concern ourselves with, and the Dresden Road. This perhaps is where the distinction between a national guard base and a United States Military base become significant. Even so, this appears to present a complex factual issue which cannot readily be decided on the basis of the evidence – whilst we are guided on the basis of the claim put to us by counsel that the United States Military undertakes regular activities upon the base, and we take judicial notice of the diverse evidence put before this court and others on other occasions. For instance, it seems to us from a certain number of cases that the United States appears to behave as if the Dresden Road base forms part and parcel of Federal property. *Cf. Higraphi v. U.S. Military*, 2:23-cv-0023/ART; *United States v. Toxicoust*, 2:23-cr-0046/QWT. Whether it actually is Federal land or not is a question we need not resolve today, and we note that the CONGA and CNOGA have serially asserted State ownership. Whilst we accept that "[t]he federal government may also create these enclaves by reserving jurisdiction when a state first enters the Union." *Allison*, 689 F.3d, at 1236 n.1, it is neither pleaded nor shown at our bar and in any event it is not critical to our proceedings today.

The road is a slightly different proposition. The meagre evidence that we have before the court – that is to say, and we regret it, virtually none – suggests that the situation is different for the Dresden Road itself. Practice, as far as we can tell, since time immemorial (we return to that notion *infra*), is that the Dresden Road has, by and large, served as a public road. Whether the land which encompasses

the road was ever part of Federal property, we decline to consider, first since it is not before the court, second because even if a prescriptive easement adverse to the Federal sovereign cannot be created, under the doctrine of lost grant, the road can be deemed granted to the State through its continuous use and maintenance thereof as a public road, and, thirdly, since the very text of the DROA appears, through its language – "[the Federal Government] shall, *upon* the passage of this act, take immediate ownership [of the Road]" – to tacitly recognise just as much. It is clear that even if the Federal Government may have originally had a claim to title, it did nothing to enforce it. In the alternative, if we consider that the road never was part of Federal property, then that property must belong to the State, as must all title be presumed to be.

Before proceeding onto the effect of the various Acts passed by the two dueling governments at our bar, we pause for what is something of a light stroll into the concept of "time immemorial" upon which we rely so heavily in this present action. The classic English sense of time immemorial was formally set out by statute in 1275, appointing a day certain in 1189 as the furthest extent of English legal memory, yet this theory procures little satisfaction. As far as we can tell, there is no conclusive authority as to the question.

Most of our authorities do, however, appear to give credence to the view that time immemorial is merely such a period so long that the "memory of man runneth not to the contrary." 25 C.J.S. § 4 (Internal quotation marks omitted). Under this theory, immemoriality is by its very nature a flexible, dynamic concept, liable to to be expressed in an absolute duration, but rather in view of the circumstances in which it is asserted. *Cf. Aguas Lenders Recovery Group LLC v. Suez, S.A.*, 585

F.3d 696, 698 n.1 (2d Cir. 2009) (Explaining a given practice had existed since "time immemorial" within the U.S. District Court for the Southern District of New York); *United States v. Miller*, 208 U.S. 32, 36 (1908) (Explaining that since "time immemorial" certain naval officers have enjoyed certain titles and styles); *Inland Steel Co. v. U.S.*, 306 U.S. 153, 156 (1939) (Power of court to award injunction has existed since "time immemorial"); *In re Grand Jury Subpoenas*, 454 F.3d 511, 518 (6th Cir. 2006) ("Grand juries have lain at the very heart of our criminal justice system since time immemorial"); *Santosky v. Kramer*, 455 U.S. 745, 770 (1982) (Claiming that the area of family law has been a State, and not Federal, matter since "time immemorial") (REHNQUIST, J., dissenting); *Hoff v. Iron Clad Manufacturing Co.*, 139 U.S. 326, 327-28 (1891) ("The crimping or doubling in of the ends of paper packages has … been a common practice from time immemorial."); *United States v. Cojab*, 996 F.2d 1404, 1407 (2d Cir. 1993) ("Criminal proceedings conducted in secret have had from time immemorial an odious tinge that carries with it a scent of grave injustice reminiscent of the Spanish Inquisition and the English Star Chamber."); *Culver v. Armstrong*, 832 F.3d 1213, 1218 (10th Cir. 2016) ("[A] warrantless arrest absent probable cause has been unlawful from time immemorial"); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 47 (2d Cir. 2000) ("From time immemorial it has been the rule in this country that litigants are expected to pay their own expenses, including their own attorneys' fees, to prosecute or defend a lawsuit."); *Defenders of Wildlife v. Everson*, 984 F.3d 918, 936 (10th Cir. 2020) ("From time immemorial, a cardinal principle of American government has been the separation of powers.").

For obvious reasons, it occurs to us that the possession is indeed one of immemoriality – it would be perfectly impossible for us to

attempt to ascertain original title, nor establish the antiquity of title, and we take judicial notice of the fact that no person would in fact be able to furnish this court with any evidentially supported theory thereto.

C – The effect of the DROA and CONGA

As we held *supra*, the effect of the DROA has been to condemn that road under eminent domain. This of course is nothing irregular in and of itself, since "[t]he Fifth Amendment does not preclude the taking of private property for public use. Rather, it requires the government to justly compensate the private property owner for any authorized taking." *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1042 (10th Cir. 2001). As discussed *supra*, a "private property owner" can also include the State. Even though it is clear that in taking ownership, the plaintiff has not been paid a penny, this itself is not fatal to the condemnation, since "the Fifth Amendment [does not] require that just compensation be paid in advance of, or contemporaneously with, the taking" *Olson v. AT&T Corp.*, 431 F. App'x 689, 691 (10th Cir. 2011) (quoting *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City.*, 473 U.S. 172, 194, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985)) (internal citations and quotation omitted), but merely a means by which that compensation may be sought. The principal such method is inverse condemnation. "Inverse condemnation is a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *Cary v. U.S.*, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (quoting in part *Moden v. United States*, 404 F.3d 1335, 1342 (Fed. Cir. 2005)) (internal quotation marks omitted) *accord United States v. Sioux Nation of*

Indians, 448 U.S. 371, 388 n.17 (1980) ("The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i. e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking.") (quoting *United States v. Klamath Indians*, 304 U.S. 119, 123 (1938)).

This proceeding, when brought against the United States, is to be had in the United States Court of Federal Claims, to which the remainder of this action is transferred, see *infra*.

To be sure, there is one other circumstance under which the DROA would be invalid, if the condemnation under eminent domain does not serve a "public use" U.S. Const. amend. V. Certainly, one may question whether or not the State is in fact the better proprietor of the land surrounding a base belonging to it (see *infra*). That perhaps is more of a prudential concern derived from the virtues of consistent, holistic policy initiatives, rather than one which fatal to the "public use" of the Federal condemnation. Of course, "public use" is more proximate to "public purpose" than "use by the general public", *cf. Kelo v. City of New London*, 545 U.S. 469, 477-80, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005), and courts appear to apply what is in effect a rational basis review in considering whether or not a taking is for a "public use". See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984) ("where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause"); *Kelo*, 545 U.S., at 490-91 (KENNEDY, J., concurring) (comparing *Midkiff* standard to rational-basis review).

Under this sort of standard, "[t]he judiciary should defer to the legislature's public use determination unless the use involves an "impossibility" or is "palpably without reasonable foundation."" *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1156 (9th Cir. 1997) (quoting in part *Midkiff*, 467 U.S., at 240-41). Of course, this type of review is "highly deferential" *Christian Heritage Academy v. Oklahoma Secondary School Activities Ass'n*, 483 F.3d 1025, 1038 (10th Cir. 2007), and decisions carry "a strong presumption of validity" *Id.* (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)), and the court can substitute or insert what appears obvious to it as a rational basis even when the government itself does not officially state one, *cf. United States v. Titley*, 770 F.3d 1357, 1359 (10th Cir. 2014) ("The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.") (citation omitted) *accord Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1216 (10th Cir. 2011) ("This standard is objective—if there is a reasonable justification for the challenged action, we do not inquire into the government actor's actual motivations."). Here, the rational basis is both asserted and intellectually unchallenging to understand – the government explains that the taking of the land was used to further the activities of the United States Military. There can be no doubt that this is not an irrational basis.

We must lastly consider the effect of the CONGA in considering the question. The CONGA, and latterly the Colorado National Guard Organisation Act (CNGOA) both make provisions for the ownership of the Dresden Road Military Base. *Cf.* CONGA, § 4(a) ("All National Guard installations and all land surrounding them, excluding the stretch of Dresden Road between the two checkpoints in the MEZ, in

Boulder County shall be considered property of the Great State of Colorado."); CNGOA § 7(A)(i) ("the "Colorado National Guard Headquarters" located on Dresden road, BC CO and have a jurisdiction within the designated Military Exclusion Zone around it."). As neither attempt to assert ownership or condemn the Dresden Road itself, we need not consider that question, but merely that the *base* belongs to State, the DROA and CONGA/CNGOA are not directly in tension with one another, and we decline to address the further interrogations as to title which fall beyond the ambit of this action.

D – The validity of regulations of the road

Now we look at the validity of the regulations imposed upon the Dresden Road, which the plaintiffs challenge. It is not an ambitious claim to suggest that Congress can regulate Federal land, c*f. United States v. Jones*, 768 F.3d 1096, 1104 (10th Cir. 2014) ("[I]t is generally understood and accepted that Congress has authority to regulate public lands"), and such a regulation – in this case giving a military authority the right to close the road at times – is valid regardless of any contrary State regulation, since "[a]lthough state and local governments can ordinarily exercise their police powers over federal land within their boundaries, those powers must yield under the Supremacy Clause when they conflict with federal law under the Property Clause." *United States v. Bd. of Cnty. Commissioners of Otero*, 843 F.3d 1208, 1212 (10th Cir. 2016). Taking this further, "Congress unquestionably has the authority to regulate conduct on private lands that is injurious to the public domain" *Utah Native Plant Soc'y v. U.S. Forest Serv.*, 923 F.3d 860, 867 n.3 (10th Cir. 2019). See also *Duncan Energy Co. v. U.S. Forest Service*, 50 F.3d 584, 589 (8th Cir. 1995)

("Congress may regulate conduct occurring on or off federal land which affects federal land").

We need not strain ourselves excessively to demonstrate that Congress has "very broad powers … under the Property Clause to use and dispose of federal property as Congress sees fit" *Branson School District Re-82 v. Romer*, 161 F.3d 619, 636 (10th Cir. 1998), and as the Courts have explained, "[t]he United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired" *Chevron Mining Inc. v. United States*, 863 F.3d 1261, 1276 n.12 (10th Cir. 2017) (quoting *United States v. Locke*, 471 U.S. 84, 104, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985)). It goes without saying that the mere fact that the State takes issue with the DROA, and its regulation of access to the Dresden Road, does not invalidate the said regulation, for "[a]lthough state and local governments can ordinarily exercise their police powers over federal land within their boundaries, those powers must yield under the Supremacy Clause when they conflict with federal law under the Property Clause." *United States v. Bd. of Cnty. Commissioners of Otero*, 843 F.3d 1208, 1212 (10th Cir. 2016). We do not know of any authority which stands for the contrary. See generally *Wyoming v. U.S.*, 279 F.3d 1214 (10th Cir. 2002).

Moreover, we do not even think that, leaving aside the unique identity of the owner – the Federal Government – the State could actually challenge the restriction of an owner to access his own land, and, as our circuit has recognised in the First Amendment context, "the Government, no less than a private owner of property, has power to preserve the property under its control for the use to which it is

lawfully dedicated" *Utah Educ. v. Shurtleff*, 512 F.3d 1254, 1259 (10th Cir. 2008) (quoting *Cornelius v. NAACP Legal Def. Educ. Fund*, 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985)). We therefore do not see how a successful challenge could be brought against the regulations of the Dresden Road implied by the DROA.

* * * * *

Conclusion and Order

"We direct that this case be transferred to the United States Claims Court for adjudication on the merits "in the interest of justice" rather than dismissing the suit." *State of N.M. v. Regan*, 745 F.2d 1318, 1323 (10th Cir. 1984) (see authorities cited therein), and under local rules designate the action as "similar" for the purposes of assignment to the same judge. Doing so will prevent the cost and delay of refiling the action and resummoning the parties.

Having regard to the above, the Court ORDERS as follows;

1. That the court enters the following conclusions of law and findings of fact:
    a. That the Dresden Road Ownership Act is not incompatible with the United States Constitution;
    b. That the United States holds title to the land upon which the Dresden Road base is constructed;
    c. That the Dresden Road Ownership Act operates as a condemnation of the land upon which that road is situated.
2. The action is **transferred** to the U.S. Court of Federal Claims. 28 U.S.C. § 1631.
3. The plaintiff is granted **leave** to amend its complaint within seven days of this order. RCFC 15.

It is so ORDERED,

6th December 2023

/s/NewPlayerqwerty

CUSDJ